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In the Supreme Court of the United States

RICHARD CARY, SUSAN CARY, PATRICIA GEERTS, SHARON HENRY, JAMES HERZOG, DIANE KNUEFFER, PATRICIA MARTIN, ROBERT S. MARTIN, JANET MARIE PRIATT, DONA SCHNEIDER, DOUGLAS SCHWAEBE, CARL SCHWEIKERT, KATHERINE SCHWEIKERT, DAVID SOUTHCOTT, and MARY CAROL WILDER, on behalf of themselves and all others similarly situated,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. For purposes of asserting a cognizable takings claim, have the Petitioners properly pleaded and shown that the Unites States' authorized actions directly, naturally, or probably resulted in the taking of the taking of private property during the Cedar Creek Fire of October, 2003?

2. Does the ignition of the Cedar Creek Fire by a lost hunter amount to an intervening act severing the chain of causation between the Forest Service's acts and the Petitioners' damages?

3. Do assertions of risk-decreasing actions by the Forest Service amount to intervening acts severing the chain of causation between the Forest Service's acts and the Petitioners' damages?

4. Must a fire be inevitably recurring in order to effectuate a taking of personal property and real property other than the land itself?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners: Richard Cary, Susan Cary, Patricia Geerts, Sharon Henry, James Herzog, Diane Knuepfer, Patricia Martin, Robert S. Martin, Janet Marie Priatt, Dona Schneider, Douglas Schwaebe, Carl Schweikert, Katherine Schweikert, David Southcott, and Mary Carol Wilder, on behalf of themselves and all others similarly situated.

Defendant-Appellee and Respondent: United States.

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PETITION FOR A WRIT OF CERTIORARI

The individual Plaintiffs-Appellees ("Property Owners") respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit, dated January 19, 2009 is officially reported at 552 F.3d 1373, and is reproduced at App. 1a-18a.

The opinion of the Court of Federal Claims, dated November 9, 2007, is officially reported at 76 Fed. Cl. 145 and is reproduced at App. 19a-26a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit sought to be reviewed was entered on January 16, 2009. The Property Owners' timely filed Petition for Rehearing was denied on February 12, 2009, and the court's denial is reproduced at App. 27a-28a. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.2 because it is being filed within 90 days of the denial of the Petition for Rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved is the Fifth Amendment to the United States Constitution, which states, in full:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant statutory provision involved is 16 U.S.C. § 475 ("Purposes for which national forests may be established and administered"), which states, in full:

> All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all

> public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

STATEMENT OF THE CASE

This dispute arises out of the destruction of the Property Owners' real and personal property in the Cedar Fire, which originated in the Cleveland National Forest ("CNF") on October 25, 2003 and quickly spread to surrounding areas, becoming one of the largest conflagrations in California history. App. 3a. The CNF is the southernmost national forest in California, and comprises approximately 460,000 acres of varying terrain, and provides, *inter alia*, habitat for protected species, natural resources, and a wide selection of recreational opportunities. It is undisputed by the parties that the Cedar Fire

began as a small signal fire started by a lost hunter in the CNF on the opening day of deer season. *Id.*

Notwithstanding the ignition of the wildfire by a third party, the Property Owners' complaint (reproduced at App. 29a-42a) alleges that the acts of the United States Department of Agriculture's Forest Service caused a taking of private property without just compensation. The Property Owners allege that the implementation of the Forest Service's land management policies, specifically the acts of extinguishing nearly every single forest fire in the CNF over the last century, has directly, naturally, and foreseeably led to the destruction of the private property at issue by catastrophic wildfire.

The issues in this Petition arise from the United States' motion for judgment on the pleadings. Because this motion when brought against a takings claim also challenges subject matter jurisdiction, the Property Owners bear "the burden of establishing that such jurisdiction exists." *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1372 (Fed. Cir. 1994). Moreover, the unique development of inverse condemnation jurisprudence dictates an examination into the facts of the dispute to determine that treatment under the Takings Clause is appropriate because the merit of the claim informs the question of jurisdiction. *See, Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003); *Fisher v. United States*, 402 F.3d 1167, 1171-72 (Fed. Cir. 2005) (en banc). Under these circumstances a "court may consider relevant evidence in order to resolve [a] factual dispute."

Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988).

Accordingly, the Court of Federal Claims, which had jurisdiction over this dispute pursuant to the Tucker Act (28 U.S.C. § 1491(a)(1)), considered several government documents submitted by the Property Owners.[1] This evidence shows that weather, topography, and vegetation create what is known as "fire season" in California, usually during the summer and fall months, during which fire is an unavoidable fact of life for Southern Californians and a part of the area's natural ecology. USDA Forest Service, *Draft Land Management Plan Part 1: Southern California National Forest Vision* (May, 2004), p. Vision 6; USDA Forest Service, Gen. Tech. Rep. PSW-7, *Can Southern California Wildland Conflagrations Be Stopped?* (1974), p. 1; App. 3a-4a. Notably, fire season in the CNF is not limited to summer and fall, but is in fact year round. USDA Forest Service, *Fire Restriction and Emergency Closure Plan, Cleveland National Forest, U.S. Forest Service, Region Five* (April, 1992), p. 1; App. 4a. Fire danger is further exacerbated by the impact of Santa Ana winds, which occur seasonally between September and December. *Can Southern California Wildland Conflagrations Be Stopped?*, *supra*, p. 2; App. 4a. Historically, these factors resulted in a fire season in Southern California that was characterized by frequent, low-intensity fires. U.S. General Accounting Office, GAO/T-RECED-98-273,

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[1] This evidence, some of which is cited below, was also part of the parties' joint appendix on appeal to U.S. Court of Appeals for the Federal Circuit.

Western National Forests: Catastrophic Wildfires Threaten Resources and Communities 1 (1998).

Because even these smaller, less destructive fires threaten national timber reserves and water supplies, the Forest Service implemented a policy of suppressing all wildfires in the national forests beginning no later than 1911. U.S. Department of the Interior, et al., *Review and Update of the 1995 Federal Wildland Fire Management Policy* (January 2001), p. 1; *and see*, 16 U.S.C. § 475. Today, wildfires continue to be suppressed for the protection of natural resources, including timber, air quality, water, and endangered species, and for the protection of public outdoor recreational opportunities. App. 4a. Although after 1968 the suppression of some naturally occurring fires was no longer mandated by policy (as long as the fire remained within established parameters), in practice little has changed during the last century. *Review and Update of the 1995 Federal Wildland Fire Management Policy*, *supra*, p. 1. For example, the Forest Service noted in 2003 that 97% of wildfires in California were still extinguished within 24 hours of their inception. USDA Forest Service, *California Fire Siege 2003: The Story, October 21 – November 4, 2003*, p. 7; App. 5a.

As a result of the Forest Service's approach to fire suppression over the past century, the fire ecology of Southern California has been drastically altered. *Review and Update of the 1995 Federal Wildland Fire Management Policy*, *supra*, pp. 2-3 and 5-6; *Western National Forests: Catastrophic Wildfires Threaten Resources and Communities*,

supra, pp. 1-5. By extinguishing the natural, periodic fires in the CNF, the Forest Service changed the ecology of the forest to one where flammable vegetation simply accumulated. *Western National Forests: Catastrophic Wildfires Threaten Resources and Communities*, *supra*, pp. 1-2; App. 4a. By disrupting the natural, frequent, low-intensity fires, the United States created a tinderbox out of the CNF, which is now characterized by less frequent, uncontrollable, mega-fires. *Id.* The Forest Service has been aware of this state of affairs for more than three decades, at least. *Can Southern California Wildland Conflagrations Be Stopped?*, *supra*, p. 6; App. 4a.

The Court of Federal Claims did not dispute the Property Owners' factual showing, but granted the United States' motion for judgment on the pleadings on the basis that the Cedar Fire was ignited by a hunter, rather than by an agent of the government. App. 25a. On appeal, the Federal Circuit agreed that the ignition of the fire by a lost hunter was an intervening act and also held: that the Property Owners had not met the causation requirement of a takings claim, that purported risk-decreasing actions by the Forest Service constituted intervening acts, and that fire could not cause a taking unless it was recurring. App. 1a-18a.

The instant Petition disputes the propriety of these holdings under established law. The Property Owners pleaded a discrete causal chain between Forest Service acts and the taking of private property, by showing that the direct, natural, and probable result of the continuous suppression of

forest fires is the accumulation of fuel, and that the accumulation of fuel in a fire-based ecology such as the CNF directly, naturally, and probably resulted in the conflagration known as the Cedar Fire. This contention is borne out by the United States' own documents, showing that the government knew its actions over the last century naturally led to the destruction of private property adjacent to federal lands, that the Cedar Fire was not a question of if, but when.

REASONS FOR GRANTING THE PETITION

This Court has never addressed the issue of a taking by wildfire. The only two known reported opinions on the subject determined after trial that both asserted takings were actually claims of negligent firefighting. *Thune v. United States*, 41 Fed. Cl. 49 (1998); *Teegarden v. United States*, 42 Fed. Cl. 252 (1998). Given that the federal government lists 60 pages of communities across the country in similar danger of catastrophic wildfire as of 2001, the question of a taking by wildfire is of national, and impending, importance. *Urban Wildland Interface Communities Within the Vicinity of Federal Lands That Are at High Risk From Wildfire*, 66 Fed. Reg. 43,384, 43,385-435 (August 17, 2001). This important point of federal law – under what circumstances can a citizen state a cognizable claim for a taking by wildfire – has not been, but should be, decided by this Court.

Clarity is also required because the appellate decision in this case renders meaningless the requirement that an unintended taking be the "direct, natural, or probable result" of government

action. *Moden v. United States*, 404 F.3d 1335, 1356 (Fed. Cir. 2005); *see, Cotton Land Co. v. United States*, 75 F. Supp. 232, 233 (Ct. Cl. 1948). Responding to the Property Owners' claim that government actions, particularly its continuous suppression of wildfires in the CNF, resulted in the taking of private property, the Federal Circuit held, "had the government action been to accumulate fuel loads in the CNF...then any ignition, even one negligently started by unauthorized human hands, would be adequate for that government act to satisfy the causation prong." *Cary*, 522 F. 3d at 1379.

However, it has been established, and pleaded, that the Forest Service halted the natural process that would otherwise have continually reduced the fuel load in the CNF. For purposes of pleading a cognizable takings claim, the Property Owners can discern no distinction between fire suppression actions that directly, naturally, and actually resulted in the accumulation of fuel loads in the CNF (notwithstanding the characterizations given those acts) and actions specifically accumulating fuel loads in the CNF.

The Property Owners also assert that the findings of intervening acts in this dispute are in conflict with relevant decisions of this Court and those of other Circuits. Specifically, because the Property Owners have shown that human ignition of a fire in the CNF was foreseeable and in fact a near certainty, finding such to be an intervening cause is in conflict with settled law and this Court's holding on causation. *Exxon Company, U.S.A. v. Sofec, Inc.*, 517 U.S. 831, 837 (1996).

The finding that purported risk-decreasing actions taken by the Forest Service were intervening acts is also without factual support and in conflict with this Court's definition of intervening cause in *Exxon* and the U.S. Court of Appeals for the Seventh Circuit's prohibition on dismissing a complaint for failure to plead around potential defenses. *Exxon*, 517 U.S. at 837; *United States v. Northern Trust Company*, 372 F.3d 866, 888 (7th Cir. 2004).

Finally, the holding that a wildfire must be inevitably recurring in order to state a claim for inverse condemnation is in conflict with the Fifth Amendment to the United States Constitution and settled takings law, including that of this Court. The exercise of this Court's jurisdiction is necessary in order to correct this point of law, as well.

I. REQUIRING THAT THE PROPERTY OWNERS PLEAD A GOVERNMENT ACT AUTHORIZING THE ACCUMULATION OF FUEL IN THE CNF IS CONTRARY TO ESTABLISHED PRINCIPLES OF CAUSATION IN UNINTENTIONAL TAKINGS CASES.

An inverse condemnation claim is required to meet a two-part analysis, commonly referred to as the *Ridge Line* test. *Moden*, 404 F.3d at 1342 (citing *Ridge Line*, 346 F.3d at 1355). The first prong requires a plaintiff to show that the "the government intended to invade a protected property interest or that the asserted invasion is the direct, natural, or probable result of an authorized activity and not the

incidental or consequential injury inflicted by the activity." *Id.*

As the Property Owners have never alleged an intentional taking, the Federal Circuit held that the claim at issue failed this first prong, because "there are no direct, natural, and probable paths between the actual authorized acts of suppressing fires and the Cedar Fire conflagration." App. 13a. The Property Owners, however, assert that this is an unjust characterization of the complaint and is an arbitrary conclusion in disregard of the "direct, natural, or probable" standard and the evidence presented.

As stated above, there are no reported opinions outlining the contours of a cognizable "takings by wildfire" claim, so the Property Owners reasoned by analogy to the "takings by flood" cases. *Cotton Land*, oft-cited regarding takings causation, involved the taking of flooded land situated on the Colorado River between the Hoover Dam and the Parker Dam. 75 F. Supp. at 232. The Parker Dam began impounding water in 1938 for the purpose of creating a reservoir (known as Lake Havasu) and producing needed hydroelectric power for the public. *Id.* at 232-33. After the impounding was complete, the river began depositing sand at the point where it collided with the still waters of the lake. *Id.* at 233. This sand "placed another obstacle to the full and rapid flow of the river," which resulted in the deposit of sand upriver in the river bed until the river overflowed its banks. *Id.*

The *Cotton Land* court was not receptive to government arguments that the injury was remote or consequential, holding that a taking had occurred because "a succession of events was initiated which, when the events had all occurred in their natural order, deprived the [plaintiff] of the beneficial use of its land." *Id.* at 233. The court added that "[i]f engineers had studied the question in advance they would, we suppose, have predicted what occurred." *Id.* at 233-34.

The Property Owners similarly allege that the Forest Service's acts in suppressing the natural fire ecology of the CNF initiated a chain of events that, in their natural order, led to the destruction of private property. Specifically, continuous fire suppression directly resulted in increasingly heavy fuel loads in the CNF, which then naturally resulted in the creation of uncontrollable mega-fires, rather than more frequent, low-intensity fires. These allegations are supported by the Property Owners' complaint as well as the United States' own documents, which show that it did consider this question in advance and did predict what happened. The Property Owners assert that by requiring them to plead a government act explicitly "authorizing" the accumulation of fuel in the CNF, the Federal Circuit has essentially held that characterization of the government action at issue is more important than the direct, natural, or probable results of those actions.

A. The Property Owners Pleaded and Showed through the United States' Own Documents that Their Damages Were the Direct, Natural, or Probable Result of Government Actions.

The Federal Circuit noted, "*Moden* clarified the meaning of 'direct, natural, or probable result' to mean that the injury must be the likely result of the act, not that the act was the likely cause of the injury, the latter allowing for incidental injuries resulting from a true cause-in-fact to be considered a taking." App. 9a. The court concluded that "[t]he only relevant direct, natural, or probable result of the Forest Service policies pleaded by the [Property Owners] was a heightened risk, not a wildfire that would spread to neighboring properties," and that this "does not equate to making the detrimental result direct, natural, or probable." App. 10a.

The Property Owners' claim is the epitome of a "natural" result: the effect of forces of nature. Essentially, the complaint paints a picture of the Forest Service suppressing fires over the course of the last century, acting for the public's benefit, but ultimately changing the ecology of the CNF from one of low intensity, seasonal wildfires to lands awaiting the spark to ignite a mega-fire. For example, the complaint alleges that the Forest Service's fire suppression activities "resulted in the development of unnaturally dense stands of trees and other highly flammable fuel loads in the CNF," that accordingly, a "fire caused by a hunter or other public user in the CNF would likely lead to a wildfire spreading to

neighboring privately owned properties," and that "the signal fire started in the CNF spread to neighboring privately owned lands, directly resulting in the 'taking' of [the Property Owners'] property, without just compensation." App. 39a, 40a, and 41a. These are sufficient to state a claim for inverse condemnation notwithstanding the use of phrases such as "significant risk" instead of "direct, natural and probable result."

Although the complaint does refer to, *e.g.*, the "significant risk" that a wildfire fueled by highly flammable vegetation would escape the CNF (App. 40a), the Property Owners also pleaded, "The risks attendant to [the Forest Service's] land management policies for the CNF materialized on or about October 25, 2003....*directly resulting in* the 'taking' of [the Property Owners'] property, without just compensation." App. D, ¶49 (emphasis added). Stating risk is merely a way of expressing probability, and "significant" and "heightened" risks as used in the complaint should reasonably be interpreted as "probable" for purposes of stating a takings claim at the pleading level. *See, Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) ("in reviewing a dismissal for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant"). This heightened risk or heightened potential of conflagration, when applied to the altered ecology of the CNF, makes an event like the Cedar Fire not just a question of if, but rather one of when.

Because the jurisdiction of the Court of Federal Claims requires examination of the merits of a takings claim, the Property Owners showed through the United States' own documents that the damage to their property was the direct, natural, probable, and actually foreseen result of the Forest Service's duly authorized management of the CNF. This evidence confirms that what happened was no surprise, and that the question, again, was not if, but when. For example, well in advance of the Cedar Fire, the government admitted,

> Past management practices, especially the Forest Service's decades-old policy of suppressing fire in the national forests, disrupted the historical occurrence of frequent low-intensity fires. As a result, vegetation accumulated, creating high levels of fuels for catastrophic wildfires and turning much of the region into a tinderbox.

Western National Forests: Catastrophic Wildfires Threaten Resources and Communities, supra, pp. 1-2. The CNF was one of these tinderboxes, the fire in which directly resulted in the Property Owners' injuries. *See, Urban Wildland Interface Communities Within the Vicinity of Federal Lands That Are at High Risk From Wildfire*, 66 Fed. Reg. at 43,384 and 43,390.

The complaint mirrors this foreseen causal chain, asserting that the Forest Service's management of the lands of the CNF resulted in

excessive fuel loads, that as a result of the extreme fire hazard in the CNF, a fire, and in particular a lost hunter's signal fire, would spread to neighboring privately owned properties, like those of the Property Owners. App. 34a, 36a, 39a, 40a, and 41a. Because the Property Owners have pleaded and shown the required causal connection, the Federal Circuit's opinion should be overruled.

B. Requiring a Claim to Allege an "Authorized Act" at Any or All Intermediate Steps in the Causal Chain Is an Arbitrary Standard, Given the Undisputed Evidence in the United States' Own Documents And the Deference Due Allegations at the Pleading Stage.

The Federal Circuit opined, "had the government action been to accumulate fuel loads in the CNF, even without knowledge that such fuel loads would become a large conflagration upon any ignition, then any ignition, even one negligently started by unauthorized human hands, would be adequate for that government act to satisfy the causation prong." App. 12a-13a. In support of this holding, the court stated, "This is because an ignition is the direct, natural and probable result of the government intentionally allowing fuel loads to accumulate in a fire zone, and a conflagration is the direct, natural, and probable result of this ignition in a forest with high fuel loads." App. 13a. For lack of an "authorized act of allowing the growth of the fuel loads," the Federal Circuit concluded, "there are no

direct, natural, and probable[2] paths between the actual authorized acts of suppressing fires and the Cedar Fire conflagration." *Id.*

The question here is what affirmative steps did the government take in the CNF that naturally resulted in the destruction of private property? The authorized act by the government is the suppression of wildfire in the CNF. This is not a case of an alleged failure or omission on the part of the government, but rather one of commission: the Forest Service actually suppressed wildfires, a part of the ecosystem as natural as sun and rain. Fire serves many uses in the CNF, including, but certainly not limited to, clearing out vegetative fuel buildup, germinating the seeds of certain plants, and managing insect infestation. The direct and natural result of fire suppression was the buildup of fuels, and in this respect the Forest Service's actions are no different in effect than if it had actually started stacking fuels in the forest.

Moreover, the characterization of the actions is not determinative, rather, the natural consequences of the acts control whether the Property Owners have pleaded a cognizable takings claim. *See*, *Pashley v. United States*, 140 Ct. Cl. 535, 156 F. Supp. 737, 738 (1957). As discussed, *supra*, the crux of the Property Owners' claim is that the direct, natural, and probable result of suppressing fires in the CNF was the accumulation of unnaturally high fuel levels. To paraphrase the Federal Circuit's opinion, the direct, natural, and

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[2] The proper test is disjunctive, i.e., "direct, natural, or probable." *Moden*, 404 F.3d at 1342.

probable result of continuously suppressing fires in a fire zone is that a fuel load accumulates; the direct, natural, and probable result of fuel loads accumulating in a fire zone is ignition; and the direct, natural, and probable result of ignition in a fire zone with high fuel loads is a conflagration like the Cedar Fire. *See*, App. 13a. This is a clear, discrete path between authorized acts and the resulting conflagration, notwithstanding that the United States did not itself actually stockpile fuels in the CNF or explicitly "authorize[] supplying of fuel." *Id.*

The decision of the Federal Circuit renders meaningless the standard by which unintentional takings may be shown. Under *Moden* and *Cotton Land*, a claim is proper if it, *inter alia*, alleges that the taking is the direct, natural, or probable result of government activity. If there are multiple steps in the causal chain, it must accordingly be a natural progression from one step to the next. There is no requirement that there be an authorized act at any intermediate point. In fact, under the Federal Circuit's analysis in the instant case, *Cotton Land* was wrongly decided because the plaintiff did not show that there was an authorized act allowing the deposit of sand in the river.

Current and future litigants will lose that standard without review by this Court. If a claimant's theory of causation can fail for lack of an authorized act at any intermediate point in an asserted natural sequence of events, there is simply no way to determine whether an individual is able to state a cognizable takings claim without either a

court judgment or allegations that each step in the causal chain is accompanied by an authorizing government act. For this reason and because the Property Owners have more than met the proper standard for causation when pleading a takings claim, this Court should grant certiorari.

II. HOLDING THAT THE IGNITION OF THE CEDAR FIRE BY A LOST HUNTER IS AN INTERVENING CAUSE IS CONTRARY TO SETTLED LAW AND THE OPINIONS OF THIS COURT.

Without explanation, the Federal Circuit (and, for that matter, the Court of Federal Claims) held that "the hunter lighting the signal fire was a clear intervening cause that broke the chain of causation between the authorized act and the injury." App. 15a; *see also,* App. 25a. There is simply no basis for such a holding under traditional tort principles of causation.[3]

This Court addressed the criteria for an intervening cause, stating, "The doctrine of superseding[4] cause is ... applied where the defendant's negligence in fact substantially

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[3] Tort law on causation is appropriately applied to takings cases. *See, e.g., Moden,* 404 F.3d at 1343-44 (citing the application of "the law of torts" to a takings claim to determine if an "intervening cause [broke] the chain of causation).

[4] Whether a particular jurisdiction refers to this defense as a superceding cause, an intervening cause, or remoteness of cause, the analysis is the same. *See, e.g.,* 57A Am. Jur. Negligence §§ 578 and 583 (2008); *and see, Moden,* 404 F.3d at 1343-44.

contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable." *Exxon*, 517 U.S. at 837; *see also*, *Warner v. Santa Catalina Island Co.*, 282 P.2d 12 (Cal. 1955); *and*, 57A Am. Jur. Negligence §§ 578 and 583 (2008). A reasonably foreseeable cause of independent origin is therefore not an intervening cause as a matter of law.

The government has not provided an iota of evidence in support of the proposition that the ignition of the Cedar Fire was not foreseeable and therefore an intervening cause. The Property Owners, on the other hand, have shown through the Forest Service's own documents that the ignition of the fire by a hunter was not only eminently foreseeable but also a practical certainty.

The Forest Service itself admits that "human-caused fires...account for most of the damaging wildfires." USDA Forest Service, *Draft Environmental Impact Statement for Revised Land Management Plans, Pacific Southwest Region* (May 2004), p. 3-303. Most importantly, the Forest Service's own statistics for the CNF show that in the 1990s, 921 out of a total of 996 fires (93%) were human-caused. *Id.* at Tables-5. That figure averages to **one human-caused fire in the CNF every four days**. In this respect, it was a near certainty that one or two recreational visitors would start an illegal fire in the CNF the week of the Cedar Fire. Because the ignition itself was reasonably foreseeable, it cannot serve to cut off the United States' liability.

In light of the Property Owners' showing of foreseeability at this pleading stage, and the complete lack of evidence or factual findings by the lower courts indicating that ignition of a fire by a park visitor was unforeseeable, review by this Court is needed to correct this obvious and exceptional error.

III. HOLDING THAT RISK-DECREASING ACTIONS PURPORTEDLY UNDERTAKEN BY THE FOREST SERVICE ARE INTERVENING CAUSES IS CONTRARY TO SETTLED LAW AND THE OPINIONS OF THIS COURT.

Although the question of whether Forest Service activity amounted to an intervening cause was neither briefed nor addressed at oral argument, the Federal Circuit's opinion states, "No individual [Forest Service] decision can be a beginning because each risk-decreasing action in the Forest Service's policies is an intervening act breaking whatever causal chain would lead from an accused risk-increasing action to the conflagration which destroyed the [Property Owners'] property." App. 14a. Notwithstanding the complete lack of evidence that any Forest Service act decreased the risk of damage to the Property Owners by catastrophic wildfire, this holding is untenable as a matter of law and in conflict with this Court's holding on intervening cause and the U.S. Court of Appeals for the Seventh Circuit's prohibition on dismissing a complaint on the grounds that a plaintiff has not pleaded around potential defenses.

First, the Federal Circuit did not identify what risk-decreasing action might exist that would serve to intervene in the causal chain from the Forest Service's actions in the CNF to the damage suffered by the Property Owners. Without facts to support the proposition that any Forest Service act remediated a century of fuel accumulation in the CNF, there can be no intervening act. The Federal Circuit seems to be suggesting that there are defenses that could potentially be raised in this action, but it is improper to dismiss a complaint on the grounds that the Property Owners have not pleaded around potential defenses. *See, e.g.*, *Northern Trust*, 372 F.3d at 888. If anything, the purported risk-decreasing actions might speak to the Forest Service's degree of care, were this a tort case, but considerations of reasonability simply do not apply to a takings claim. *Pashley*, 156 F. Supp. at 738 ("Defendant's liability depends not on its want of care, but on the fact of taking as the natural consequence of defendant's acts.").

Second, the Federal Circuit's opinion also failed to address under what circumstances actions by the Forest Service could act as an intervening act in its own taking, and in this respect the opinion misapprehends the applicability of the doctrine of intervening cause. Again, this Court summarized the doctrine of superseding/intervening cause, stating, "The doctrine of superseding cause is...applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause *of independent origin* that was not foreseeable." *Exxon*, 517 U.S. at 837 (emphasis

added). Even assuming that the Forest Service took a risk-decreasing action in the CNF prior to the Cedar Fire that affected the fire's spread, because such an action is not of independent origin, it cannot by definition be an intervening cause. Essentially, the Forest Service cannot legally "intervene" in the causal chain of its own creation.

The Property Owners assume that the court's reference to "risk-decreasing actions" includes activities such as the Forest Service's fuel modification efforts undertaken in certain areas, as alluded to in a footnote of the Federal Circuit's opinion:

> The [Property Owners] cherry-pick parts of the Forest Service policy which they argue have increased the risk of wildfire since 1911 without acknowledging that much of the Forest Service policy over the last century has been devoted to reducing the risk of wildfire by controlling the same fuel loads the [Property Owners] allege have been allowed to accumulate.

App. 10a.

For purposes of pleading a cause of action for inverse condemnation, the facts as alleged in the Complaint must be assumed true. *Gould*, 935 F.2d at 1271. The Property Owners pleaded that "the land management policies implemented by [the United States] over the greater portion of the 20th Century, and continuing to the present day, resulted

in the development of unnaturally dense stands of trees and other highly flammable fuel loads in the CNF." App. 39a. The Federal Circuit is not at liberty to assume, without corroborating evidence, that any action by the Forest Service decreased the risk of catastrophic wildfire to the Property Owners. Also, it is not proper to draw inferences against the Property Owners for the purpose of dismissing their Complaint. *Gould*, 935 F.2d at 1274.

In fact, the only evidence in these proceedings on the subject of fuel load remediation was presented by the Property Owners. For example, Barry T. Hill[5] testified before the House Subcommittee on Forests and Forest Health regarding the Forest Service's plan to reduce accumulated fuels in the national forests. *Western National Forests: Catastrophic Wildfires Threaten Resources and Communities*, *supra*, pp. 1-12. Mr. Hill noted that the Forest Service "was highly effective in suppressing fires in the national forests for about 75 years after 1910.... However, more recently, the agency has been less effective because excessive accumulated fuels have made fires larger and more intense." *Id.* at p. 4. In fact, in 1995, the Forest Service "estimated that 39 million acres, or about one third of all lands it manages in the interior West – more than ever known before and more than in all other regions of the country combined – are now at high risk of large, uncontrollable, catastrophic wildfires." *Id.*

Mr. Hill also testified to the Forest Service's intention, announced in 1995, "to refocus its fire

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[5] Associate Director, Energy, Resources, and Science Issues, Resources, Community, and Economic Development Division.

management program on reducing accumulated fuels" with the goal of resolving "the problem of national forest lands being at high risk of uncontrollable, highly destructive wildfires" by 2015. *Id.* at pp. 5-6. However, he concluded that such a herculean project would not be completed by 2015, due to factors such as funding issues, underestimation of the number of acres needing fuel reduction annually, maintenance of clean water and air, and endangered species protection. *Id.* at pp. 7-12.

The Property Owners do not dispute that due in large part to Forest Service efforts, the problem of the national forests' excessive fuel load is currently being addressed. However, even at present, millions of acres in the west alone are still at high risk of catastrophic wildfires due to the presence of excessive fuels. Mitigation efforts in 2003 were just underway and, even if the Forest Service's own actions could be intervening causes, no fuel remediation in any way interrupted the causal chain between the Forest Service's actions and the Property Owners' injuries. On the basis of these undisputed facts and misapprehended law, review by this Court is necessary to correct the holding of the Federal Circuit.

IV. HOLDING THAT A WILDFIRE MUST BE INEVITABLY RECURRING IN ORDER TO TAKE PROPERTY BY FIRE IS IN CONFLICT WITH THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND EVERY TAKINGS CASE FINDING THAT DESTROYED PROPERTY HAS BEEN TAKEN.

The Property Owners also assert that the Federal Circuit has misapprehended the holdings of the flood cases that require a repeated and inevitably recurring flood in order to affect a taking. App, 15a-18a. The second prong of the *Ridge Line* test requires a claimant to show "that the invasion appropriated a benefit to the government at the expense of the property owner, at least by preempting the property owner's right to enjoy its property for an extended period of time, rather than merely by inflicting an injury that reduces the property's value." *Ridge Line*, 346 F.3d at 1355. The Federal Circuit held that, as a matter of law, the Property Owners' complaint fails this test because wildfires in the area are not inevitably recurring. App. 15a-18a.

Because the Property Owners do not assert a taking of their land, but rather that the personal property and real property appurtenant to their lands were taken by fire, there need be no showing that wildfire is inevitably recurring. The Cedar Fire, by *destroying* the property claimed taken, has preempted the right of the Property Owners to use their property forever. In this respect, the Federal Circuit has taken the Property Owners' analogy to

the legal reasoning of the flood cases to a mistaken conclusion. This Court should grant this Petition in order to correct this erroneous point of law, and to bring the Federal Circuit's opinion in line with settled case law and the Fifth Amendment itself.

The flood cases cited by the Federal Circuit refer to claims of the taking of *the land itself*, not the taking of the real and personal property on the land. App. 17a-18a (and the cases cited therein); *see, e.g.*, *United States v. Lynah*, 188 U.S. 445, 470 (1903) (adjudicating the flooding of "lands belonging to an individual as to substantially destroy their value"). In essence, there is no taking for one or two floods because the owner of the property can repossess and use that land afterwards. The property claimed taken by the Property Owners does not consist of land that can (or cannot) be reoccupied, it consists of structures and personal belongings that are gone, burned to ashes. This property cannot be used in the future because it is no longer in existence. In this respect the Federal Circuit has seriously misapprehended the law of takings.

Under no circumstances can the Property Owners "repossess" the destroyed structures and personal property lost to the fire, as asserted by the Federal Circuit. App. 18a. The particular logic in defining a substantial interference with property rights in the land itself when it is temporarily submersed simply does not lend itself to other forms of taking, particularly with respect to property that has literally been destroyed.

Although the Property Owners did refer at oral argument to the fact that some "still cannot rebuild upon or in some cases cannot even access the sites of their former homes due to the destruction of infrastructure by fire," this was merely intended to highlight the extent of the destruction caused by the Cedar Fire, not for the inference "that because the fire destroyed the infrastructure, their right to enjoy their property has been preempted for an extended period of time because they cannot rebuild upon, or in some cases even access their land, five years after the fire." *See*, App. 16a. It is well established that the Property Owners are entitled to just compensation for personal property destroyed as well as real property. *E.g.*, *Daily v. United States*, 116 Ct. Cl. 723, 90 F. Supp. 699, 702 (1950).

The Federal Circuit's holding is inconsistent with takings jurisprudence and creates an illogical standard by which if a person could pay to rebuild their home or repurchase their destroyed personal property, then no taking has occurred. The takings clause simply has no exception limiting the government's liability when replacement property may be available for purchase by a claimant. Lest any doubt remain, the Property Owners are absolutely entitled to just compensation for their personal property and their real property that was destroyed in the Cedar Fire, and in this respect the Federal Circuit has misapprehended the standard for pleading a taking.

Because the allegations of property damage in the Property Owners' complaint must be treated as true at the pleading stage (*see*, App. 30a-33a for

allegations of property damage), the Federal Circuit's decision is in clear violation of the pertinent standard requiring a significant interference with property rights, and this Court should take jurisdiction over this dispute in order to correct this deviation from settled law.

CONCLUSION

For all the foregoing reasons, the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

[ENTERED: JANUARY 16, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5022

RICHARD CARY, SUSAN CARY, PATRICIA GEERTS, SHARON HENRY, JAMES HERZOG, DIANE KNUEFFER, PATRICIA MARTIN, ROBERT S. MARTIN, JANET MARIE PRIATT, DONA SCHNEIDER, DOUGLAS SCHWAEBE, CARL SCHWEIKERT, KATHERINE SCHWEIKERT, DAVID SOUTHCOTT, and MARY CAROL WILDER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Mark S. Grotefeld, Grotefeld & Hoffmann, LLP, of Chicago, Illinois, argued for plaintiffs-appellants. With him on the brief were Todd C. Harshman and Waylon J. Pickett, of San Francisco, California.

Katherine W. Hazard, Attorney, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were

Ronald J. Tenpas, Assistant Attorney General, and Katherine J. Barton and Marc A. Smith, Attorneys.

Appealed from: United States Court of Federal Claims

Senior Judge John P. Wiese

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5022

RICHARD CARY, SUSAN CARY, PATRICIA GEERTS, SHARON HENRY, JAMES HERZOG, DIANE KNUEFFER, PATRICIA MARTIN, ROBERT S. MARTIN, JANET MARIE PRIATT, DONA SCHNEIDER, DOUGLAS SCHWAEBE, CARL SCHWEIKERT, KATHERINE SCHWEIKERT, DAVID SOUTHCOTT, and MARY CAROL WILDER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 06-CV-707, Senior Judge John P. Wiese.

DECIDED: January 16, 2009

Before MAYER, LINN, and MOORE, Circuit Judges.

MAYER, Circuit Judge.

Richard Cary, et al., ("landowners") appeal the judgment of the United States Court of Federal Claims denying their claims against the United States for the taking of their property without just compensation by inverse condemnation in the 2003 California "Cedar Fire." Cary v. United States, 79 Fed. Cl. 145 (2007). Because the landowners have not stated a claim for which relief may be granted, we affirm.

BACKGROUND

The landowners are aggrieved owners of properties neighboring the Cleveland National Forest ("CNF"), near San Diego, California. On October 25, 2003, a deer hunter lost in the forest lit a signal fire to aid his rescue. Named the Cedar Fire, the fire spread and became one of the largest conflagrations in California history. The fire claimed the lives of fifteen people, and consumed more than 273,000 acres of land, 2,232 residences, twenty-two commercial structures, and 566 outbuildings. The landowners' properties were in the burned area.

Fires are an unavoidable fact of life in Southern California, where they frequently and

predictably occur during a "fire season." The area including the CNF is so prone to fire that its fire season is year-round, with Santa Ana winds exacerbating the likelihood and intensity of fires between September and December. It is believed that fires have occurred seasonally in the CNF since before humans lived in North America. According to the landowners, early fires were frequent, but of low-intensity, burning out without intervention. Beginning in 1911, the United States Forest Service implemented a policy to suppress all fires in the CNF, originally to protect timber and water reserves. Today such reasons include protecting natural resources, air quality, and endangered species, and for public recreation.

In 1968, the Forest Service ended its policy of mandatory suppression of fires, and replaced it with a policy of selective suppression, allowing fires to run their natural course under prescribed conditions, such as occurring late in the fire season. Within a few years, the Forest Service recognized that some places in the Southern California fire zone, including the CNF, were sustaining particularly high fuel loads which posed a greater risk for conflagration, and implemented policies called "fuel modification" which were designed to clear and thin flammable vegetation and lower the risk of conflagration. The Forest Service conducted prescribed burns in the CNF to lower the risk of fire, although they were prevented from using prescribed burns in some areas because of such obstacles as riparian area or endangered species protection.

In 2003, the year of the Cedar Fire, 97% of fires were extinguished within twenty-four hours of their discovery. This near total suppression of fires, the landowners allege, altered the "fire ecology" of the CNF by disrupting the natural, frequent, low-intensity fires. They argue that low-intensity fires consumed the underbrush and other flammable vegetation in the forest, and so the suppression of fires allowed the vegetation to accumulate into unnaturally thick stands of trees and underbrush. Any fire in the CNF, if not immediately controlled, would become a devastating firestorm, and on October 25, 2003, the lost hunter illegally set such a fire. Because it occurred late in the day, fire crews were prevented from reaching it immediately in light of Forest Service policy which prohibited firefighting after sunset. By the next day, it had become a major conflagration and eventually consumed the landowners' properties.

The landowners filed suit in the United States Court of Federal Claims on behalf of themselves and all others similarly situated who sustained damage to a property interest as a result of the fire. They accused the Forest Service of taking the known calculated risk that its land management policies in the CNF would result in a taking of adjacent landowners' property in the event of a fire originating in the CNF that spread outside its boundaries. Thus, they alleged that the United States took their property by inverse condemnation without just compensation.

The government moved for judgment on the pleadings because the landowners failed to allege

facts showing that the Forest Service management policies in the CNF effected a compensable taking of their property for public use under the Fifth Amendment. It argued that the fire was caused by a lost hunter illegally setting a fire, not government policy. The court entered judgment for the government: "Our difficulty is not with the foreseeability of the harm plaintiffs suffered, but with the cause of the harm." Cary, 79 Fed. Cl. at 148. The court further stated that unless the hunter was acting as its agent, causation could not be attributed to the government. Id. The landowners appealed.

DISCUSSION

When reviewing appeals in which the Court of Federal Claims entered judgment on the pleadings pursuant to its Rule 12(c), we apply the same standard of review as a case dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and review the judgment de novo. See Chang v. United States, 859 F.2d 893, 894 (Fed. Cir. 1988). We must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff. Gould Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991). To state a claim, the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. See Bell Atlantic Corp. v. Twombley, 550 U.S. 544, ___, 127 S. Ct. 1955, 1966 (2007). The factual allegations must be enough to raise a right to relief above the speculative level. Id. at 1965. This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is

plausible on its face. Id. at 1974. The landowners also must prove subject matter jurisdiction. Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1372 (Fed. Cir. 1994).

Whether a taking under the Fifth Amendment has occurred is a question of law with factual underpinnings. Alves v. United States, 133 F.3d 1454, 1456 (Fed. Cir. 1998). Therefore, we review the determination of law de novo, while in this case the facts must be accepted as alleged.

The landowners placed the liability of the United States under the Tucker Act, which grants the Court of Federal Claims jurisdiction over claims for money damages "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000); United States v. Mitchell, 463 U.S. 206, 216 (1983). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

The Fifth Amendment to the United States Constitution provides in part that "private property [shall not] be taken for public use, without just compensation." Because the government conducted no formal exercise of eminent domain, this case is for alleged "inverse condemnation." See Moden v. United States, 404 F.3d 1335, 1342 (Fed. Cir. 2005). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when

condemnation proceedings have not been instituted." Id. (quoting United States v. Clarke, 445 U.S 253, 257 (1980)) (quotation marks omitted).

The landowners rely on an analogy between the fires here and flooding in cases typified by Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003), which set out a two part test that can be characterized as causation and appropriation. In the causation prong, it must be shown that "the government intend[ed] to invade a protected property interest or [that] the asserted invasion [was] the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." 346 F.3d at 1355 (citation removed). The landowners allege that two Forest Service policies constituted the authorized activities that caused the Cedar Fire. First, they cite the circa 1911 policy of suppressing all forest fires in the CNF and the nearly century long suppression of all or nearly all fires, instead of allowing them to consume the accumulated fuel load in the forest. Second, they cite the policy of allowing human visitors to enter the forest for recreational purposes. The fire, they say, was the direct, natural, probable result of these policies.

To prevail the landowners must first show that the government intended to invade a protected property interest. Clearly, the government did not intend to take the landowners' land by use of an uncontrolled wildfire, and they do not allege that it did. Instead, they say that because they did "not allege that the government intentionally appropriated [their] property" the trial court can

infer intent if the asserted injuries were "the direct, natural, or probable result of the [authorized government action], rather than merely an incidental or consequential injury." Ridge Line, 346 F.3d at 1356. They also point out that "an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury." Moden, 404 F.3d at 1343 (Fed. Cir. 2005). Moden clarified the meaning of "direct, natural, or probable result" to mean that the injury must be the likely result of the act, not that the act was the likely cause of the injury, the latter allowing for incidental injuries resulting from a true cause-in-fact to be considered a taking. Id. (requiring plaintiffs to present evidence that the contamination of their ranch was the likely, foreseeable result of the authorized use of a chemical on a nearby military installation). Therefore, to survive judgment on the pleadings, the landowners must plausibly show that the consumption of their property by fire was the likely, foreseeable result of Forest Service action.

Their complaint alleges that the government created a risk that wildfires would spread to neighboring properties through its policies. The government "was or should have been aware that its land management policies as they related to fire suppression and prevention for the CNF created a significant risk that a wildfire originating in the CNF and fueled by the buildup of highly flammable vegetation in the CNF would spread to adjacent landowners' properties." They similarly pleaded that the government took the calculated risk that a recreational user would start a fire, would do so

during the extreme fire conditions of October 2003, and that the fire would likely become a wildfire resulting in the taking of property adjacent to the forest. Accepting arguendo that a policy is an action,* in charging the government with increasing the risk of a conflagration that would spread to neighboring properties, the landowners appear to have reversed the Moden rule, alleging that the policies were the likely cause of the loss of their property. At a minimum, they have not pleaded that the loss of property would be the likely, foreseeable result of a policy of fire suppression and recreational use, but merely that the government knew of or increased a risk. Taking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable. The only relevant direct, natural, or probable result of the Forest Service policies pleaded by the landowners was a heightened risk, not a wildfire that would spread to neighboring properties. The hole in the causal chain is the conversion of this risk into a wildfire by the hunter who started it.

The landowners argue that too much emphasis is placed on the ignition of the fire, and that the government is not required to light the match in order to effect a taking. Like the Moden

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* The "policy" is not one authorized action but a set of intertwined, authorized actions. The landowners cherry-pick parts of the Forest Service policy which they argue have increased the risk of wildfire since 1911 without acknowledging that much of the Forest Service policy over the last century has been devoted to reducing the risk of wildfire by controlling the same fuel loads the landowners allege have been allowed to accumulate.

plaintiffs, the landowners rely on the line of flood cases in which the government was found liable for a taking when water impounded for a dam flooded areas beyond the planned impoundment. In Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948), a poorly constructed dam caused sediment to deposit in the riverbed upstream of the dam. Over time, the sediment raised the level of the river bottom until the waters crested the banks, flooding the plaintiff's land. The court found a taking even though the injury occurred years after the act of constructing the dam, because the flooding was the "natural consequence[] of the collision of sediment-bearing flowing water with still water, and the progress upstream, of the deposit begun by that collision." Id. at 233. The court further noted that had the engineers studied the question in advance, they would have predicted the flood with specificity. Id. at 233-34. In Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964), the court further explained that the permanent flooding of the landowners' property in Cotton Land was "originally set in motion by the erection of the dam," id. at 645, and that the flood was the "actual and natural consequence of the Government's act" because it was the natural progression of a chain of events occurring in a natural order without an intervening activity to break the chain of causation. Id.

The landowners argue that the Forest Service policies are analogous to building a dam. Dams disrupt the natural flow of water for the public good in the same way that fire suppression disrupts the natural consumption of fuel for the public good. Like the Cedar Fire, the flooding in Cotton Land did not

occur immediately after governmental action; the flooding resulted from "a succession of events . . . initiated" by the erection of the dam, including the filling of the riverbed with sediment which raised the level of the water and eventually overtopped the riverbanks flooding the private property. 75 F. Supp. at 233.

The key difference between the flood cases and the instant controversy is that the policy of suppressing fires did not set the Cedar Fire in motion as the dams did the floods. Cf. Avery, 330 F.2d at 645. As the court in Cotton Land noted, further study would have predicted the flood, when it would occur, and where it would occur. 75 F. Supp. at 234. Here, as the landowners implied in their pleadings, for an injury resulting from the policy of suppressing fires in the CNF to occur, something had to ignite the fire. While the landowners pleaded that the government took the risk of a hunter or other recreational user starting a fire in the forest with its policy of welcoming such users, an actual ignition, not a risk, is what set the wildfire in the CNF. The hunter setting the fire was an intervening cause which broke any perceived chain of causation between the Forest Service's policies and the Cedar Fire.

This is not to say that the government may escape liability per se by finding an incidental intervening or contributing cause between their authorized action and the alleged injury. Wherever there is an authorized action, the causation prong is satisfied for any injury which is the direct, natural, and probable result of that action. For instance, had

the government action been to accumulate fuel loads in the CNF, even without knowledge that such fuel loads would become a large conflagration upon any ignition, then any ignition, even one negligently started by unauthorized human hands, would be adequate for that government act to satisfy the causation prong. This is because an ignition is the direct, natural and probable result of the government intentionally allowing fuel loads to accumulate in a fire zone, and a conflagration is the direct, natural, and probable result of this ignition in a forest with high fuel loads. However here, there is no authorized act of allowing the growth of fuel loads, and there are no direct, natural, and probable paths between the actual authorized acts of suppressing fires and the Cedar Fire conflagration. Only by an intervening cause was the authorized action converted into a damaging event. The landowners would be correct that the government did not need to light the match to be liable, but to be a taking, it must have at least authorized supplying the fuel.

As a result, the question may not be whether the Forest Service's polices, a lost hunter, or even a bolt of lightning caused the Cedar Fire. Ignition sources are ubiquitous in the CNF, but the landowners must allege in their complaint that the fire that destroyed their property was the direct, natural, and probable result of the forest management policies. They have not. The sequence of events in Cotton Land operated like a Rube Goldberg machine, with a concrete beginning (the dam), an ending (the flood), and in the middle, a series of steps each inevitably following from the one

before it. Here, there is no concrete beginning, but merely a long sequence of decisions, some risk-increasing but others risk-decreasing, spread out over decades. No individual decision can be a beginning because each risk-decreasing action in the Forest Service's policies is an intervening act breaking whatever causal chain would lead from an accused risk-increasing action to the conflagration which destroyed the landowners' property. Therefore, we cannot infer from the complaint the steps between fuel load accumulation and the damage to the landowners' property with the specificity required by Cotton Land. Instead, the landowners attempt to rely on the insufficient general allegation that the risk of damage arose from the buildup of flammable vegetation.

The landowners also respond that where the injury is foreseeable, there can be no intervening cause. See Moden, 404 F.3d at 1343-34 (reviewing the rejection of the "remoteness of cause" defense in Cotton Land, 75 F. Supp. 232). They argue that the government actually foresaw the destruction of property by fire escaping the CNF. However, they misunderstand the precedent. Avery clarified that we look to the law of torts when handling a remote cause, and when no intervening cause breaks the chain of causation, we have found a taking. 330 F.2d at 644-45. "[I]n other words, injury may not be foreseeable if an intervening cause breaks the chain of causation." Moden, 404 F.3d at 1344. This does not mean that the reverse is true, that an injury foreseeable necessarily is without a break in the chain of causation. Foreseeability and causation are separate elements that must both be shown (when

intent is not alleged). See Moden, 404 F.3d at 1343 ("In addition to causation, an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury." (emphasis added)). For an injury to be a compensable taking, the court must determine that no break in the chain of causation existed between the suspected government authorized action and the injury. The landowners have identified the fire suppression and recreational use policies as the government authorized actions which caused the destruction of their property. However, even if the destruction of the property was foreseeable, as we must accept at the pleading stage, the hunter lighting the signal fire was a clear intervening cause that broke the chain of causation between the authorized act and the injury.

The landowners also fail to satisfy the appropriation prong of Ridge Line. "Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." Ridge Line, 346 F.3d at 1356. The landowners have not pleaded and we cannot discern any reason to conclude that the invasion has appropriated any benefit to the government.

The landowners pleaded that the government was acting in the public interest when it performed under its fire suppression and recreational use policies. They said that the Forest Service continued

its land management policies, including its public access practices, in furtherance of the public's interest: the preservation of timber, watersheds and wildlife, and public use and enjoyment. They argue that they should not be required to shoulder the loss for the public. However, these public interests are not benefits resulting from the invasion that destroyed the properties. To the contrary, the wildfire that destroyed the properties also destroyed the public interests the policies sought to protect.

This is in contrast to the flood cases. For instance, in Ridge Line, when the landowners' property was inundated, even though sporadically, the government was found to have acquired a flowage easement from the runoff created by its alteration of the area's storm drainage. 346 F.3d at 1352. Here, the government has acquired no easement of any sort, or any other property through the fire.

The landowners also argue that they meet the second prong because their real and personal property was destroyed. They argue that one can plausibly infer from this allegation that because the fire destroyed the infrastructure, their right to enjoy their property has been preempted for an extended period of time because they cannot rebuild upon, or in some cases even access their land, five years after the fire. But we cannot plausibly infer that the fire, which was the invasion and is now extinguished, still prevents the rebuilding of infrastructure that would allow the landowners to reoccupy their property.

To meet this preemption formulation of the appropriation prong, the complaint must allege that "the government's interference with any property rights of [the landowners] was substantial and frequent enough to rise to the level of a taking." Ridge Line, 346 F.3d at 1357. That language developed from the long history of the Supreme Court's flooding cases. A flood that invades land permanently may give rise to a takings claim. United States v. Lynah, 188 U.S. 445, 470 (1903) ("It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment."). Similarly, a flood gives rise to a taking where it creates a "permanent liability" because of "intermittent but inevitably recurring overflow." United States v. Cress, 243 U.S. 316, 328 (1914) ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other."). But floods that visit once and then recede do not give rise to takings claims. Sanguinetti v. United States, 264 U.S. 146, 150 (1924) (holding that "the injury was in its nature indirect and consequential, for which no implied obligation on the part of the Government can arise" where flooding is neither permanent, nor is intermittent but inevitably recurring); see also Bartz v. United States, 633 F.2d 571, 577 (Ct. Cl. 1980) (listing cases where plaintiffs could not recover because "they failed to prove the element of

inevitably recurring floods"). The former two types of floods appropriate the landowner's property; the latter injures but does not appropriate it.

The landowners contend that the taking is permanent, arguing that "[f]ire, however, is not like one or two floodings that recede and then allow for a repossession of the land." But many a city has rebuilt after a devastating fire, so we cannot infer from the complaint that the fire prevented the rebuilding of infrastructure that would allow the landowners to reoccupy their property. Furthermore, floods and fires can both substantially injure real and personal property with merely one invasion. In the flooding cases, appropriation means that the water stays on the property indefinitely, or predictably returns—a permanent invasion. Here, the fire has come and gone, and there is no allegation that the injuries prevent future use of the land, or that the fire will intermittently but inevitably recur. To satisfy the appropriation requirement, the preemption must be sufficiently permanent that it can be said that the government has exercised dominion over the property.

CONCLUSION

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED

[ENTERED: NOVEMBER 1, 2007]

In the United States Court of Federal Claims

No. 06-707L
Filed: November 1, 2007

RICHARD CARY, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Fifth Amendment Takings—The Forest Service's fire suppression policies cannot support a claim for inverse condemnation when the damage complained of was the result of a fire caused by an individual not acting as the government's agent.

Mark S. Grotefeld, Grotefeld & Hoffmann, L.L.P., Chicago, Illinois, counsel for plaintiffs.

Heide L. Herrmann, with whom was Acting Assistant Attorney General Ronald J. Tenpas, U.S. Department of Justice, Environment and Natural Resources Division, Natural Resources Section, Washington, DC, counsel for defendant.

ORDER

WIESE, Judge.

Plaintiffs, fourteen landowners in Southern California, sue here for just compensation under the Fifth Amendment to the United States Constitution for damage to their properties resulting from a forest fire in the Cleveland National Forest that began on October 25, 2003. Plaintiffs maintain that the forest fire, although set by a lost hunter, was the consequence of the United States Forest Service's long-standing land management policies and that the losses they suffered therefore constitute a taking of property by the United States government.

The case is currently before the court on defendant's motion for judgment on the pleadings on the ground that the complaint, on its face, fails to state a basis for relief under the Fifth Amendment. The court heard oral argument on defendant's motion on October 16, 2007. At the close of the argument, the court entered a bench ruling in defendant's favor. This order explains more fully the basis for that ruling.

I.

The Cleveland National Forest (the "Forest") is the southernmost national forest in the state of California, located just north of Mexico and east of the city of San Diego. The Forest comprises some 460,000 acres of varying terrain. On October 25, 2003, a group of individuals was granted access to a remote area of the Forest to hunt deer. One of these hunters, who had become separated from the group, started a small fire in an attempt to signal for help. The fire, referred to as the Cedar Fire, quickly spread out of control, however, and over the next five

days burned more than 273,000 acres of woodland, 2,232 private residences, 22 commercial structures, and 566 outbuildings, making it, at the time, the largest fire in California history. Tragically, the Cedar Fire also claimed the lives of fourteen civilians and one firefighter.

According to plaintiffs' complaint, extreme fire hazard conditions existed within the Forest on or before the time the Cedar Fire began. These conditions, plaintiffs contend, were due in large part to the Forest Service's decades-long policy of suppressing naturally occurring fires in favor of preserving natural resources for the benefit of the public, thus contributing to the growth of unnaturally dense stands of trees and to the creation of highly flammable fuel loads in the Forest. Plaintiffs maintain that the fire risks associated with these land management policies were further heightened by the public's use of the Forest lands for recreational purposes, such as hunting, which the Forest Service not only permitted but in fact encouraged. Plaintiffs thus argue that as a result of these policies, a major conflagration—originating within the Forest but spreading beyond the Forest boundaries to engulf adjacent properties—was a virtual certainty. Plaintiffs additionally note that such a major conflagration was not only predictable but in fact was predicted by the Forest Service significantly in advance of the Cedar Fire. Plaintiffs thus view their losses as the certain result of deliberate policy choices made by the Forest Service acting in full awareness of the risks those policies entailed. Such deliberate action, plaintiffs claim,

constitutes a taking of their property by inverse condemnation.

II.

In considering defendant's motion for judgment on the pleadings, we must accept the truth of the facts as set forth in the complaint. Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (holding that the court must "assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant"). The question, then, is whether, as a matter of law, plaintiffs' facts establish a taking of property by inverse condemnation. We conclude that they do not.

"Inverse condemnation is a 'shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" Moden v. United States, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)). Fundamentally, inverse condemnation is a cause of action grounded on invasive government activity, initiated without the benefit of a formal exercise of the power of eminent domain, that results in the prolonged or continuous interference with an owner's use and enjoyment of his property. Id.

To succeed on a claim alleging inverse condemnation, a property owner must prove that "the government intend[ed] to invade a protected property interest or [that] the asserted invasion [was] the 'direct, natural, or probable result of an

authorized activity and not the incidental or consequential injury inflicted by the action.'" Ridge Line, Inc. v. United States, 346 F.3d 1346, 1356 (Fed. Cir. 2003) (quoting Columbia Basin Orchard v. United States, 132 Ct. Cl. 445, 450 (1955)). To bring themselves within the framework of this requirement, plaintiffs identify as the government action giving rise to their claim the various land management policies—the statutes, directives, and goals—that drive and inform the government's management of the Forest.[1] Plaintiffs argue that these policies "as designed, carried with them the direct, natural, probable, and foreseen result of damage by fire to lands adjacent to the [Forest]," in particular that "disturbance to the fire regime in the [Forest] directly, naturally, and foreseeably led to the increased magnitude and spread of the Cedar Fire and the resulting damage to Plaintiffs' properties."

In making their case, plaintiffs rely on a series of inverse condemnation cases involving damage by flood as analytically similar to their own situation. Plaintiffs point, for example, to Cotton Land Co. v. United States, 109 Ct. Cl. 816 (1948), a case in which the government's impoundment of water

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[1] Included among the statutes that plaintiffs identify as comprising part of the government's land management policies are the Organic Administration Act (16 U.S.C. § 475 et seq.), the National Environmental Policy Act (42 U.S.C. § 4321 et seq.), the Federal Advisory Committee Act (5 U.S.C. App. 2), the Endangered Species Act (16 U.S.C. § 1531 et seq.), the Clean Water and Clean Air Acts (33 U.S.C. § 1251 et seq. and 42 U.S.C. § 7401 et seq.), and the National Forest Management Act (16 U.S.C. § 1600 et seq.).

behind the Parker Dam led, over a period of years, to the build-up of the river bed above the dam through the disposition of sand and thus eventually to the permanent flooding of the plaintiffs' upstream properties. In concluding that a taking had in fact occurred, the court explained:

> The events which occurred, although they took some time, were only the natural consequences of the collision of sediment-bearing flowing water with still water, and the progress upstream, of the deposit begun by that collision. If engineers had studied the question in advance they would, we suppose, have predicted what occurred.

Id. at 829. The court thus saw the invasion of plaintiffs' land as "the actual and natural consequence of the Government's act." Id.

Just as the government's disruption of the river flow in Cotton Land led to an alteration of the river's ecology and ultimately to the river's invasion of the claimants' lands, plaintiffs argue that here, too, the government's disruption of naturally occurring fires as a seasonal element in the Forest's regime led to an alteration of the Forest's ecology and ultimately to the creation of a condition that invaded plaintiffs' lands. For plaintiffs, then, the loss of their properties by fire was as foreseeable a result of the government's action as was the loss of the plaintiffs' lands by flooding in Cotton Land.

Although plaintiffs argue their position well, we cannot accept it. Our difficulty is not with the foreseeability of the harm plaintiffs suffered but with the cause of the harm. At their core, claims of inverse condemnation involve physical invasions of private property by forces that the government itself has set into motion. That is not the case here. The government did not cause the Cedar Fire. Rather, as the facts demonstrate, a hunter started the fire. And unless one is prepared to say that the hunter was acting as the government's agent, causation cannot be attributed to the government. It must follow, then, that since the government was not an actor, it cannot be a taker.

In reaching this conclusion, we remain mindful of plaintiffs' assertion that the Forest Service's fire suppression policies heightened the risk of a major conflagration. That fact may be relevant to a tort theory (a point on which the court intends to express no opinion), but not to a takings theory. What plaintiffs may challenge here under the Fifth Amendment is what the government actually did; not the effects to which its land management policies may indirectly have contributed.

III.

For the reasons announced at oral argument and as further explained above, defendant's motion for judgment on the pleadings is granted. The Clerk is directed to enter judgment dismissing plaintiffs' complaint. No costs.

s/John P. Wiese
John P. Wiese
Judge

[ENTERED: FEBRUARY 12, 2009]

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5022

RICHARD CARY, SUSAN CARY, PATRICIA GEERTS, SHARON HENRY, JAMES HERZOG, DIANE KNUEFFER, PATRICIA MARTIN, ROBERT S. MARTIN, JANET MARIE PRIATT, DONA SCHNEIDER, DOUGLAS SCHWAEBE, CARL SCHWEIKERT, KATHERINE SCHWEIKERT, DAVID SOUTHCOTT, and MARY CAROL WILDER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 06-CV-707, Senior Judge John P. Wiese

O R D E R

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

O R D E R

Before Mayer, Circuit Judge, Linn, Circuit Judge, and Moore, Circuit Judge.

A petition for rehearing having been filed by the Appellants,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on March 9, 2009.

FOR THE COURT,

s/Jan Horbaly
Jan Horbaly
Clerk

Dated: 02/12/2009

cc: Mark S. Grotefeld
Katherine Hazard

CARY V US, 2008-5022
(CFC - 06-CV-707)

[ENTERED: OCTOBER 13, 2006]

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD AND SUSAN CARY, PATRICIA GEERTS, SHARON HENRY, JAMES HERZOG, DIANE KNUEFFER, PATRICIA MARTIN, ROBERT S. MARTIN, JANET MARIE PRIATT, DONA SCHNEIDER, DOUGLAS SCHWAEBE, CARL AND KATHERINE SCHWEIKERT, DAVID SOUTHCOTT, and MARY CAROL WILDER, on behalf of themselves and all other similarly situated, who sustained damage to a property interest as a result of the Cedar Fire,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

CLASS ACTION COMPLAINT FOR INVERSE CONDEMNATION

COMPLAINT

Plaintiffs, RICHARD AND SUSAN CARY, PATRICIA GEERTS, SHARON HENRY, JAMES HERZOG, DIANE KNUEFFER, PATRICIA MARTIN, ROBERT S. MARTIN, JANET MARIE PRIATT, DONA SCHNEIDER, DOUGLAS SCHWAEBE, CARL AND KATHERINE SCHWEIKERT, DAVID SOUTHCOTT, and

MARY CAROL WILDER, on behalf of themselves and all other similarly situated (hereinafter referred to collectively as "PLAINTIFFS"), by their attorneys, GROTEFELD & DENENBERG, L.L.C., sue Defendant, THE UNITED STATES (hereinafter referred to as the "DEFENDANT"), for the uncompensated taking of PLAINTIFFS' property. As grounds for their complaint, PLAINTIFFS state as follows:

INTRODUCTION

1. This lawsuit, stemming from the Cedar Fire of October 2003 (hereinafter referred to as the "Cedar Fire"), seeks redress for the PLAINTIFFS' property interests that were taken without just compensation as a result of DEFENDANT'S acts.

JURISDICTION AND VENUE

2. This court has exclusive jurisdiction over the subject matter of this action, and venue is appropriated pursuant to the Tucker Act, 28 U.S.C. § 1491(a) in concert with the Fifth Amendment to the United States Constitution, which prohibits the DEFENDANT from any "taking" of private property without just compensation.

PARTIES

3. At all relevant times herein, Plaintiffs Richard and Susan Cary owned real and personal property located at 16725 Harrison Park Trail, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

4. At all relevant times herein, Plaintiff Diane Knueffer owned real and personal property located at 30 Twin Oaks Road, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

5. At all relevant times herein, Plaintiffs Carl and Katherine Schweikert owned real and personal property located at 16952 Iron Springs Road, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

6. At all relevant times herein, Plaintiff David Southcott owned real and personal property located at 17264 Iron Springs Road, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

7. At all relevant times herein, Plaintiff James Herzog owned real and personal property located at 30 Twin Oaks Road, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

8. At all relevant times herein, Plaintiff Patricia Geerts owned real and personal property located at 14805 Mussey Grade Road, Ramona, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

9. At all relevant times herein, Plaintiff Janet Marie Priaatt owned real and personal

property located at 13835 Fernbrook Drive, Ramona, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

10. At all relevant times herein, Plaintiff Sharon Henry owned real and personal property located at 1383 Fernbrook Drive, Ramona, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

11. At all relevant times herein, Plaintiff Dona Schneider owned real and personal property located at 14062 Fernbrook Drive, Ramona, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

12. At all relevant times herein, Plaintiff Mary Carol Wilder owned real and personal property located at 14110 Fernbrook Drive, Ramona, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

13. At all relevant times herein, Plaintiff Douglas Schwaebe owned real and personal property located at 13150 Genesis Way, Lakeside, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

14. At all relevant times herein, Plaintiff Robert S. Martin owned real and personal property located at Assessors Parcel Numbers: 1) 294-160-22-00; 2) 294-160-26-00; 3) 293-180-30-00; 4) 293-180-

34-00; 5) 293-180-58-00; 6) 293-180-59-00; 7) 293-180-60-00; 8) 293-180-63-00; and 9) 293-180-64-00, North Peak, Cuyamaca, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

15. At all relevant times herein, Plaintiff Patricia Martin owned real and personal property located at Assessors Parcel Number: 294-160-23-00, North Peak, Cuyamaca, Julian, California that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

16. At all relevant times and as though fully set forth herein, other persons similarly situated owned real and/or personal property at locations described in Exhibit "A" to this Complaint that was taken without just compensation during the Cedar Fire as a result of DEFENDANT'S acts.

17. PLAINTIFFS are informed and believe that at all pertinent times herein, DEFENDANT, d/b/a the United States Department of Agriculture ("USDA"), the USDA Forest Service, and/or other federal governmental entities duly organized and existing under and by virtue of the laws of the United States, owned and was in control of the public land commonly known as the Cleveland National Forest.

FACTUAL BACKGROUND

18. The Cleveland National Forest (hereinafter referred to as the "CNF") consists of 460,000 acres of varying terrain and is the southernmost National Forest in the State of California. It is located just north of Mexico and east of the City of San Diego.

19. On and well before October 25, 2003, extreme fire hazard conditions existed within the CNF as a direct result of DEFENDANT'S land management policies for the CNF, DEFENDANT'S public access policies regarding the CNF, and other known precipitating factors including, but not limited to, dried vegetation, low humidity, high temperatures, predicted high winds and other seasonal weather conditions in Southern California.

20. On October 25, 2003 a group of public citizens was granted access to remote areas of the CNF by DEFENDANT to hunt deer. One of these hunters started a small signal fire in the CNF when he became separated from the group. The small signal fire, then confined to the CNF, was observed by citizens and reported to governmental agencies, including the DEFENDANT, during the afternoon of October 25, 2003.

21. Over the course of the next five (5) days, what was a small signal fire spread from the CNF to surrounding properties and became the largest fire in California history. The Cedar fire burned more than 273,000 acres, 2,232 residences, 22 commercial structures, 566 outbuildings and took

the lives of fourteen (14) civilians and one (1) firefighter.

22. Local, State and Federal governmental agencies have determined that as a result of the Cedar Fire, the monetary losses suffered by property owners in the County of San Diego, including the property noted in Exhibit "A" to this Complaint, exceeded Two Hundred Million Dollars ($200,000,000.00).

CLASS ALLEGATIONS

23. This action is brought in accordance with Rule 23 of the Rules of the Court of Federal Claims.

24. The class consists of persons who owned property located in and around the County of San Diego whose real and/or personal property was damaged and/or destroyed during the Cedar Fire that occurred on or about October 25, 2003 (hereinafter referred to as the "CLASS").

25. The CLASS is so numerous that joinder of all members individually is impracticable. Attached to this Complaint as Exhibit "A" and incorporated as though fully set forth herein is a list of addresses showing properties where the County of San Diego has found damage and/or destruction of a property occurred as a direct result of the Cedar Fire. Though Plaintiffs are informed and believe that the CLASS includes thousands of persons, as the Cedar Fire affected over 2,000 residences, the

CLASS is nonetheless manageable as there is a record of damaged and destroyed properties.

26. The questions of law and fact at issue in this controversy are common to the CLASS. The same decisions and calculated risks taken by DEFENDANT affected and are common to the CLASS. Decades of land management policies employed by DEFENDANT in the CNF as well as guidelines utilized by DEFENDANT in the CNF to facilitate public recreational use of the CNF during times of heightened fire danger carried the risk that neighboring private property would be "taken," and ultimately these failed policies led to the damage and destruction of the property interests of all potential CLASS members.

27. DEFENDANT treated the entire CLASS similarly with respect to its land management and public access policies within the CNF.

28. The questions of law and fact common to the CLASS predominate over questions of law and fact which affect only individual members of the CLASS. The common core of salient facts (the acts and/or omissions of DEFENDANT alleged herein) applies to the injuries sustained by all individual members of the CLASS. The individual claims will differ only in the amount of damages and the nature of the property interest impaired. If beneficial or necessary for judicial economy, subclasses may be formulated reflecting the specific types of damages suffered by CLASS members.

29. The claims of the named PLAINTIFFS are typical of the claims of the CLASS. All claims, whether by named PLAINTIFFS or members of the CLASS, stem from injury to property interests as a result of the same acts and/or omissions of DEFENDANT. Although some individuals comprising the claimant CLASS will not have sustained one or several of the types of damages suffered by the named PLAINTIFFS (for example renters will not have suffered damage to land), the converse is not true.

30. Many members of the CLASS who did not sustain extensive property damage (i.e., renters) would most likely not pursue a claim if a class action were not available due to the burden and expense of litigation.

31. The named PLAINTIFFS are able fairly and adequately able to protect the interests of all members of the CLASS, since the named PLAINTIFFS have interests in this action which are coincident with and not adverse to the CLASS they represent, and since the named PLAINTIFFS individually have a substantial financial interest in this action. The named PLAINTIFFS are also members of the CLASS.

32. The named PLAINTIFFS have employed attorneys experienced and competent in representing numerous plaintiffs in the prosecution of complex property damage claims, including large wildfire related litigation.

33. On balance, a class action is superior to other methods available for adjudicating the controversy. By maintaining this action as a class action, individual CLASS members who have claims which might not otherwise warrant individual actions are provided with an accessible forum for redress of their claims, and the possibility of repetitious litigation will be eliminated. Individual litigation of the claims of all CLASS members is impracticable. By contrast, conducting this action as a class action with respect to some or all of the issues presented herein, presents fewer management difficulties, conserves the resources of the parties and of the court system, prevents inconsistent results, and protects the right of CLASS member.

CLAIM FOR INVERSE CONDEMNATION

34. PLAINTIFFS hereby incorporate by reference, as though fully set forth herein, paragraphs 1 to 33.

35. Upon information and belief, at all relevant times DEFENDANT was responsible for and in fact controlled forest and vegetation management within the CNF.

36. Upon information and belief, at all relevant times DEFENDANT was responsible for fire modeling within the CNF.

37. Upon information and belief, at all relevant times DEFENDANT was responsible for emergency response planning within the CNF.

38. Upon information and belief, at all relevant times DEFENDANT was responsible for general fire abatement and suppression activities within the CNF.

39. Upon information and belief, it was DEFENDANT'S land management policy from 1911 to 1968 to suppress each and every wildfire in National Parklands, including the CNF, so as to preserve all timber and watersheds, as well as to conserve National Parkland wildlife for public use and enjoyment.

40. Upon information and belief, while DEFENDANT'S land management policy with respect to wildfire suppression in the CNF changed in 1968 to the extent that it no longer explicitly mandated the suppression of all wildfires, DEFENDANT'S fire suppression policies in the CNF remain focused on preserving natural resources for the public's use, whether based on safeguarding a watershed, protecting timer, or permitting public recreational access to the CNF.

41. Upon information and belief, the land management policies implemented by DEFENDANT over the greater portion of the 20th Century, and continuing to the present day, resulted in the development of unnaturally dense stands of trees and other highly flammable fuel loads in the CNF.

42. At all relevant times, DEFENDANT was or should have been aware that its land management policies as they related to fire suppression and prevention for the CNF created a

significant risk that a wildfire originating in the CNF and fueled by the buildup of highly flammable vegetation in the CNF would spread to adjacent landowners' properties.

43. Upon information and belief, at all relevant times herein DEFENDANT was responsible for granting the general public's use of and access to the CNF.

44. Upon information and belief, over the latter half of the 20th Century, and continuing to the present day, DEFENDANT'S land management policies not only permitted, but encouraged the CNF to be increasingly used by the public for various recreational purposes, including hunting.

45. Upon information and belief, at all relevant times herein one of the DEFENDANT'S land management policies was to permit public recreational access to and use of the CNF for hunting purposes during heightened fire hazard conditions, despite the known risk of a fire being started by a hunter or other like recreational user in the CNF, and despite the known risk that any such fire caused by a hunter or other public user in the CNF would likely lead to a wildfire spreading to neighboring privately owned properties.

46. On or about October 25, 2003, DEFENDANT, in granting hunters and other like public recreational users access to the CNF, took the calculated risk that if any hunter or other like recreational user started a fire that privately owned property situated adjacent to the CNF would be

damaged and/or destroyed by the spread of wildfire from the CNF to those properties.

47. DEFENDANT made the deliberate decision to continue its land management policies, including its public access practices, in furtherance of the public's interest in spite of the known attendant risk of a wildfire spreading from the CNF to privately owned property.

48. DEFENDANT, acting in the public interest, took the known calculated risk that its land management policies in the CNF would result in a "taking" of adjacent landowners' property in the event of a fire originating in the CNF and spreading beyond the CNF's boundaries.

49. The risks attendant to DEFENDANT'S land management policies for the CNF materialized on or about October 25, 2003 when during a known period of extreme fire hazard conditions, the signal fire started in the CNF by the separated hunter spread to neighboring privately owned lands, directly resulting in the "taking" of PLAINTIFFS' property, without just compensation.

50. The PLAINTIFFS, whose property was "taken" by DEFENDANT, should not be required to shoulder alone the devastating effects of DEFENDANT'S land management policies. Rather, that burden should be borne by the DEFENDANT itself.

WHEREFORE, PLAINTIFFS respectfully request this Honorable Court to certify this action as a class action and enter a judgment against Defendant, THE UNITED STATES, in an amount no less than Two Hundred Thirty Six Million, Eight Hundred Ninety Thousand, Six Hundred Forty Eight dollars ($236,890,648.00) as just compensation for the Fifth Amendment "taking" of PLAINTIFFS' property, plus interest, cost, and attorneys fees pursuant to 28 U.S.C. §2412 and as otherwise accorded by law.

Dated this 12th day of October, 2006

Respectfully submitted,

/s/ Mark S. Grotefeld
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